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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —

THE UNITED STATES, CROSS-PETITIONER

v.

EDWARD P. STAHEL & CO., INC., INTERSTATE HOSIERY MILLS, INC., LIBERTY LACE & NETTING WORKS, A CORPORATION, COOPER, WELLS & COMPANY, MAY MCEWEN KAISER COMPANY, OSCAR HEINEMAN CORPORATION, SAKURA MILLS, INC., C. J. ABEGG AND EMIL RINGGER, DOING BUSINESS AS ABEGG & COMPANY, REAL SILK HOSIERY MILLS, INC.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

On December 31, 1948, Edward P. Stahel & Co., and the other cross-respondents above named filed a petition for a writ of certiorari to review a judgment of the Court of Claims in No. 490. A brief in opposition to that petition is being filed by the United States.

The Solicitor General, on behalf of the United States, prays that, in the event the Court grants the petition in No. 490, but only in that event, a writ of certiorari be directed to the Court of Claims to review those parts of its judgment in which it is held (1) that there was a "taking" of cross-respondents' silk within the meaning of the Fifth Amendment, and (2) that, there being a taking, it occurred on October 16, 1941. The certified transcript of the record in No. 490 includes those portions of the record upon which this cross-petition is based.

OPINION BELOW

The opinion of the Court of Claims (R. 97) is reported at 78 F. Supp. 800.

JURISDICTION

The judgment of the Court of Claims was entered on June 28, 1948 (R. 109). Motions for a new trial were overruled on October 4, 1948 (R. 110). By an order of the Chief Justice, dated December 29, 1948, the time within which to file a cross-petition for a writ of certiorari was extended for a period of 60 days up to and including March 3, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether under the facts of this case the Court of Claims was correct in holding that there was a "taking" by the United States of cross-respondents' silk within the meaning of the Fifth Amend-

ment, and in therefore giving judgment for interest from the date of taking to the date of payment and carrying charges from the date of taking to the date of delivery.

2. Whether, assuming that there was a taking, the Court of Claims correctly held that the silk was taken on October 16, 1941 and that interest and compensation for carrying charges should run from that date.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are listed in the brief in opposition which the United States is filing in No. 490, and are set out in the appendix thereto. Amended Order M-22 issued by the Office of Production Management on October 16, 1941, is also set out in the Appendix to this cross-petition.

STATEMENT

The pertinent facts are fully set forth in the Brief in Opposition which the United States has filed in No. 490, and the Court is respectfully referred to that statement as setting forth the facts which are pertinent here.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that there was a "taking" of the silk of the nine cross-respondents within the meaning of the Fifth Amendment and that cross-respondents therefore were entitled to interest and carrying charges from the date of such "taking".

2. In holding, even assuming that amended Regulation M-22 of October 16, 1941, could be the basis for a "taking", that the taking occurred when the authority to place orders was granted rather than when it was exercised.

3. In holding, assuming either that the amendment of October 16, 1941, to the Office of Production Management's Order M-22 constituted a "taking" or that the exercise of such authority constituted a "taking", that there was a "taking" of the silk of cross-respondents Edward P. Stahel & Co., Inc., and Oscar Heineman Corporation.

REASONS FOR GRANTING THE WRIT

In the instant case, all of the cross-respondents have been paid the full amount which the Court of Claims found to be the value of the raw silk which the Government acquired either by purchase or requisition subsequent to October 16, 1941. The court below, however, has held that the amendment of October 16, 1941, to the Office of Production Management's Order M-22, which amendment provided that certain enumerated purchase orders calling for the use of silk were assigned a preference rating of A-10, and that acceptance of such orders "is required", constituted a taking of the cross-respondents' raw silk for public use. It accordingly awarded cross-respondents interest on the value of the silk from October 16, 1941, until the date of payment, and also allowed recovery for storage and handling charges from October 16,

1941 until the date the Government took possession of the raw silk. We submit that in so holding the court below erred. The amended order of October 16, 1941, was not a taking; even if it was the taking did not occur on that date; and, finally, in respect of two cross-respondents, their raw silk was not acquired under the October order but under an earlier and different one.

1. The two reasons given by the court below for holding that the issuance on October 16, 1941, of amended Order M-22 (Appendix, *infra*, p. 12) was a "taking", are that by the order the silk owners (1) were forbidden to deliver or use their raw silk except by authority of the Government and (2) were required to sell their silk, if so requested, to the Government or contractors furnishing certain designated supplies to the Government. It has already been pointed out in the Government's brief in opposition, p. 10, that a freezing order is not a "taking" within the meaning of the Fifth Amendment, and for the same reason we submit that no taking can be predicated upon the first of the two reasons set out above.

The second reason given also fails to support the finding of a "taking". The then-existing system of priorities shows that the "mandatory" words relied upon by the Court of Claims did not compel compliance, and the negotiations of the parties show that cross-respondents could have ignored the order and retained their silk. The "mandatory" words

relied on by the court below are "acceptance thereof is required." They appear in the Office of Production Management's amended Order of October 16, 1941;[1] in Part (b) of that order, any contract or order for raw silk placed by the Defense Supplies Corporation was "assigned a preference rating of A-10, and acceptance thereof is required". In Part (a), the provisions of Priorities Regulation No. 1[2] were "deemed a part of this Order, except in so far as they are inconsistent herewith". Priorities Regulation No. 1, issued by the Office of Production Management on August 27, 1941, provided that a "Defense Order" included a contract or order assigned a preference rating of A-10 or higher [§ 944.1 (b) (3)]. It also provided that "Defense Orders * * * must be accepted and fulfilled in preference to any other contracts or purchase orders for such Material (§ 944.2) and that "Defense Orders" need not be accepted:

> If the Person seeking to place the Defense Order is unwilling or unable to meet regularly established prices and terms of sale or payment, but there shall be no discrimination against Defense Orders in establishing such prices or terms. [§ 944.2(b)(2)].

It is known that the purpose of the quoted provision was to eliminate the very problem of just compensation under the Fifth Amendment which is

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[1] Appendix, *infra*, p. 13.
[2] Federal Register of Aug. 30, 1941 (6 Fed. Reg. 4489).

here raised.[3] Thus, the words relied upon by the lower court to support its view that compliance was necessary (R. 102-103), must be construed as circumscribed by the existing priorities system and in the light of Priorities Regulation No. 1. So construed, they mean that acceptance of such orders was required only in preference to unrated or lower rated orders and was not required at all where the one placing the order was unwilling or unable to meet the suppliers' regularly established prices and terms of sale. They cannot be construed as requiring delivery of the silk, for the Priorities Act at this time (the period prior and immediately subsequent to Pearl Harbor) contained no puni-

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[3] O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures* (1944) 13 Geo. Wash. L. Rev. 1, 33-34: "The detailed statement of the conditions under which defense orders had to be accepted, incorporated in Priorities Regulation No. 1, was the result of long study and consideration of the legal and constitutional issues involved. The regulation provides that such orders must be accepted, only if the persons placing them are willing and able to meet the suppliers' 'regularly established prices and terms of sale.' By permitting the supplier to fix his own prices, the question of just compensation under the Fifth Amendment to the Federal Constitution was eliminated. It is clear that the regulation was a proper exercise of the power to allocate and distribute materials. It is equally clear under the precedents that the direction did not constitute a 'taking' under the Federal Constitution; but, in any event, the authorization to the supplier to fix his own prices eliminated the possibility of a claim that he was being deprived of just compensation. More perplexing problems under this provision have arisen since the enactment of the federal price legislation, and it later became necessary to adopt the interpretation that 'regularly established prices' may in no case exceed legal ceiling prices." The authors were General Counsel and Assistant General Counsel, respectively, of the War Production Board, formerly the Office of Production Management.

tive sanction,[4] and reliance was placed upon voluntary cooperation. A true taking would have necessitated an order at least equivalent in its mandate to that found in *Liggett & Myers Tobacco Co.* v. *United States,* 274 U. S. 215. There the Act granting authority to requisition was referred to and set out, language indicating a taking was used, and it was specified that the order was "to be accepted and filled in any event". The words "acceptance is required", circumscribed expressly as they were by the existing system of priorities, are in no way equivalent to the references to requisitioning statutes and language in the *Liggett & Myers* case, and thus do not make this order mandatory in the sense of constituting a "taking" because they leave the silk owner the right to retain his silk. The fact that the United States found it necessary four months later (February 10, 1942) to requisition 17,177 bales of raw silk (Finding 22, R. 69) confirms this view. The United States had not obtained that silk in spite of the fact that contracts, adopted for use under the authority of the amended Order M-22 of October 16, 1941, and paraphrasing its "mandatory" language, were sent to all known holders of raw silk in order that all of their silk might be purchased.[5]

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[4] Act of June 28, 1940, 54 Stat. 676, as amended, 54 Stat. 875, 55 Stat. 236. Not until March 27, 1942 was a failure to comply made punishable. 56 Stat. 177.

[5] Findings 19 and 20, R. 65, 68. The contract form and the accompanying letter sent out are set out in these findings and clearly show that the only words used which could support

The negotiations between the United States and certain silk owners clearly show as a matter of fact that the silk owners had the opportunity to accept or reject (Finding 32, R. 81; Finding 38, R. 85). Where a property owner is given the choice of handing over or of retaining his property, that property has not been "taken". Cf. *Walker & Co.* v. *United States,* 64 F. Supp. 135, 105 Ct. Cls. 553; *E. I. DuPont De Nemours & Co.* v. *Hughes,* 50 F. 2d 821 (C. A. 3).[6] We submit accordingly that there was at no time a "taking" of the silk of any of the cross-respondents within the meaning of the Fifth Amendment, and that they were not entitled to interest or to compensation for carrying charges as ordered by the Court of Claims.

2. Even if it be assumed that the "mandatory" words were sufficient to constitute a taking, we submit that such a taking did not occur on October 16, 1941, the date upon which amended Order M-22 was issued. The mere issuance of this order pro-

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taking were again those used in the Order of October 16, 1941. In both the form and the letter it was stated that the order had a preference rating of A-10 and that therefore acceptance was mandatory.

[6] In the *Walker* case, and in the instant case the Government was employing the policy (also used in the *DuPont* case, *supra,* under the Lever Act) of attempting to obtain the property involved by means short of requisitioning before actually employing the power to requisition. This policy is underscored by the third condition precedent to an exercise of the requisitioning authority as set out in the Act of October 16, 1941, 55 Stat. 742, which states that it must be determined that, "all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted . . .".

viding that silk owners must accept orders for silk *if requested,* at the very most merely authorized the placing of "mandatory orders" each of which would amount to a "taking". Until that authority was exercised, the cross-respondents would retain possession of and title to their silk and there was no direct invasion of their property amounting to a taking. The authority might not be used, might be amended, or might be rescinded entirely. The property might have been taken under other authority (55 Stat. 742). A "taking" does not occur by the mere granting of authority to "take", but must await the definite exercise of that authority. *Danforth* v. *United States,* 308 U. S. 271, 286. *United States* v. *Sponenbarger,* 308 U. S. 256, 267.

We submit that if there was a taking, it could not have occurred before the date upon which the authority was exercised, December 23, 1941,[7] and therefore that the interest and compensation for handling charges ordered by the judgment would not begin to accrue until this time.

3. If it be assumed either that the issuance of amended Order M-22 constituted a "taking", or that the exercise of the authority thereby granted constituted a "taking", there was no taking as to cross-respondents Edward P. Stahel and Co. and Oscar Heineman Corporation who accepted contracts (Findings 30, 43, R. 80, 89) which con-

[7] On this day the orders issued under authority of amended Order M-22 were sent to holders of raw silk. Finding 20, R. 68.

tained no "mandatory" language whatsoever, and which were adopted for use and sent to raw silk holders on September 1, 1941 (R. 62), before the issuance of amended Order M-22 on October 16, 1941 (Finding 18, R. 62). The Court of Claims in its opinion held that this was not important because (1) the orders were accepted after October 16 and it was the "rule" then that acceptance was required, and (2) if they had not executed this form they would have received the "mandatory" form sent out on December 23, 1941. 78 F. Supp. 804. The rule referred to by the court, that acceptance was required, flowed directly from amended Order M-22, and obviously was confined to orders placed under the authority of that order. The other reason given also fails to support the court's conclusion. The fact that property may be requisitioned if a contract is not accepted is no ground for finding a requisition where the contract is accepted. *E. I. DuPont Co.* v. *Hughes,* 50 F. 2d 821, 825 (C. A. 3). We submit that the finding of the Court of Claims that the contracts sent to these two cross-respondents were "mandatory", and therefore constituted a "taking", rests on a supposition of what could have happened, rather than upon the facts which clearly show as to these two cross-respondents that there was no "taking", and that they are therefore not entitled to the interest and compensation for handling charges awarded by the judgment.

The orders and procedures relating to the purchase or requisition of raw silk in 1940 and 1941 will not, so far as we are able to perceive, have any relevance to the purchase or "taking" of other types of supplies. While we regard the questions raised herein as incorrectly decided below and as having importance in this case, we do not urge upon the Court the granting of this cross-petition in the event that the petition for certiorari is denied in No. 490. On the other hand, if certiorari is granted in No. 490, we urge that the judgment of the Court of Claims should also be reviewed on the the questions discussed above.

CONCLUSION

For the reasons stated, but only on the condition suggested above, it is respectfully submitted that this cross-petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH, 1949.

APPENDIX

The following Amendment to General Preference Order M-22 was issued by the Office of Production Management on October 16, 1941 (6 F. R. 5290):

Amendment to General Preference Order No. M-22 to Conserve the Supply and Direct the Distribution of Silk.

Whereas, the uncertainty of future shipments of raw silk from abroad and national defense requirements for silk have created a shortage thereof and it is necessary in the public interest and to promote the defense of the United States to conserve the supply and to allocate the said supply in the manner and to the extent in this Order provided;

Now, therefore, it is hereby ordered, That: General Preference Order No. M-22 is hereby amended to read as follows:

§ 963.1 General Preference Order No. M-22 —(a) *Applicability of Priorities Regulation No. 1.* All of the provisions and definitions of Priorities Regulation No. 1, issued by the Director of Priorities on August 27, 1941, shall be deemed a part of this Order, except in so far as they are inconsistent herewith.

(b) *Required and permitted deliveries.* (1) The following orders are hereby assigned a preference rating of A-10, and acceptance thereof is required:

(i) Any contract or order for silk cloth, shroud lines, tape or thread for either life, materiel, or flare parachutes placed by the War

Department, the Navy Department, or the Department of Commerce for such parachutes to be delivered to or for the account of the Army, Navy or Weather Bureau of the United States.

(ii) Any contract or order for silk in any form required by the person placing the same to fulfill his contracts or orders on hand, provided such silk is to be physically incorporated in material to be delivered under contracts or orders included under (i) above.

(iii) Any contract or order for raw silk placed by the Defense Supplies Corporation.

(2) Deliveries of imported raw silk may be made to any person importing the same, either directly or through an agent.

(c) *Restrictions on deliveries.* Notwithstanding anything in Priorities Regulation No. 1 to the contrary, no person shall hereafter sell or otherwise transfer title to, or make any deliveries, and no person shall purchase or accept delivery of Raw Silk except as provided in paragraph (b) hereof, unless specifically authorized by the Director of Priorities.

(d) *Restrictions on throwing, weaving and other processing.* (1) No person shall, during any week, knit, weave or otherwise process thrown silk in excess of the amount knit, woven or otherwise processed by him during the week ending July 26, 1941, unless specifically authorized by the Director of Priorities.

(2) No person shall throw, spin or otherwise process Raw Silk except as otherwise provided

herein or unless specifically authorized by the Director of Priorities.

(e) *Reports.* Each person delivering or accepting delivery of Raw Silk in accordance with paragraph (b) hereof, or as specifically authorized by the Director of Priorities, shall, on or before the close of the next business day following such delivery or acceptance notify the Textile Section Research Department, Office of Production Management, in writing, of the amount, the bale numbers, origin, denier size and color of any bales of Raw Silk so delivered or accepted, the names and addresses of the persons delivering and accepting delivery, and the identifying number or numbers of the War, Navy, or Commerce Department contracts in material delivered under which such Raw Silk is to be physically incorporated.

(f) *Appeal.* Any person who considers that compliance with this Order would work an undue hardship upon him may appeal by telegraph or mail to the Director of Priorities, Office of Production Management, Washington, D. C., setting forth the pertinent facts and the reason such person believes that he is entitled to relief.

* * * * *

DONALD M. NELSON,
Director of Priorities.

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